

Roles and Responsibilities of the ZBA

Paul G. Sanderson, Esq.
Staff Attorney
Local Government Center
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There is a huge amount to learn:

- Why does the ZBA exist?
- When is ZBA relief not required?
- Jurisdiction and Authority.
- Relationship to others.

Why is a ZBA established?

- RSA 673:1, IV, every zoning ordinance must include provision for a ZBA.
- Failure to include provision for a ZBA will render a zoning ordinance invalid.
 - Jaffrey v. Heffernan, 104 NH 249 (1962)

The ZBA Has No Legislative Powers

- Zoning ordinance or building code created by planning board, citizen petition, or governing body, and adopted by town meeting or the city or town council
- The Master Plan, Subdivision & Site Review regulations created by the Planning Board
- The ZBA takes these documents as they exist, and does not change them

The ZBA Has No Executive Powers

- Building permits and code decisions are issued by the Building Inspector or the Selectmen, not the ZBA
- Enforcement decisions made by administrative officials, not the ZBA
- Road classification decided by legislative body, not the ZBA

The ZBA is a Quasi-Judicial Body

- The ZBA collects **evidence**, finds the facts, and applies legal tests to determine if relief from the ordinance should be granted.
- It **interprets** the ordinance and has the final say on the *meaning* of the language.
- It **perfects** the ordinance through its power to **overrule or modify** decisions of administrative officials.

A constitutional “safety valve”

- The federal and state constitutions both prohibit the taking of private property for public use without just compensation.
 - US Const. 5th amd, NH Const. Pt. 1 Art 2 & 12
- The ZBA prevents the ordinance from unconstitutionally taking the economic value of land (“**inverse condemnation**”), through its variance and equitable waiver powers.

Jurisdiction

- RSA 674:33:
 - Administrative appeal
 - Variances, and special exceptions
- RSA 674:33-a: Equitable Waiver of Dimensional Requirements
- RSA 674:34: Building Code Appeals
- RSA 674:41: Class VI or private road

The Process of Adjudication

- Procedural due process is critical, i.e. notice to all affected parties and an opportunity to be heard
- Applicants may not change their request for the type of relief during hearing; i.e. A special exception cannot become a variance, due to notice issue

Adjudication

- Decisions are not to be made based upon the presence or absence of opposition, but solely on the **evidence**.
- The burden of proof is upon the **applicant**.
- The only board where a minimum of 3 “Yes” votes required to act, rather than a majority, See RSA 674:33, III.
- Decisions must be in writing, RSA 676:3.

When is ZBA Relief Not Needed? (Each of these a seminar in itself)

- **Non-conforming uses or structures** that predate the passage of the ordinance provision, i.e. “grandfathering”.
- **Governmental uses** that do not conform to the ordinance, subject to RSA 674:54.
- The use is allowed because a federal or state law expressly or impliedly ***preempts*** the local ordinance.

Equitable Waiver of Dimensional Requirements

- A simple remedy for honest mistakes
- Dimensional only, not “use” violations
- A “waiver”, and does not create a non-conforming use
- Future changes must comply with zoning in effect at the time

Equitable Waiver, Elements

- 1. Violation not discovered until after substantial completion
- 2. A “good faith error”, by owner or building official, not ignorance, misrepresentation
- 3. Does not create a “public or private nuisance”
- 4. Cost of correction outweighs public benefit, and thus unfair.

Administrative Appeals

- To resolve claims of ***error*** in the decisions of:
 - “Administrative Officials” RSA 676:5, II (b)
 - Building Inspector or zoning official
 - Board of Selectmen
 - Planning Board, RSA 676:5, III
 - Historic District Commission, RSA 677:17

Administrative Appeals

- Administrative Officials, exception:
 - Cannot review “discretionary” acts, including refusal to take enforcement action
- Planning Board or HDC, exception:
 - Cannot review decisions involving “innovative land use control” issues

Special Exceptions, RSA 674:33, IV

- A use that is ***permitted*** by the ordinance, subject to additional criteria or standards
- Burden placed on the applicant to show that all of the additional criteria are met
- Runs with the land, but may be subject to conditions to prevent expansion or change, see Rye v. Ciborowski, 111 NH 77 (1971).

What is a Variance?

- A variance serves to exempt a property and its use from the application of the zoning ordinance;
- Cannot be granted unless **all five** elements are met;
- The relief “**runs with the land**”, not specific to the applicant.

The Five Elements

- No diminution in the value of surrounding properties
- Not contrary to the public interest;
- Owing to special conditions, a literal enforcement of the terms of the ordinance will result in unnecessary hardship;
- Spirit of the ordinance will be observed;
- Substantial justice will be done

Disability Exception

- A variance may be granted for reasonable accommodations necessary for a physically disabled person to use a property.
- The “hardship” element does not apply
- The variance may be limited to a person, and does **not** run with the land.
 - RSA 674:33, V

1. Public Interest

- Granting the variance will not do harm, meaning:
 - The use can't alter the essential character of the neighborhood; or
 - Threaten the public safety, health or welfare;
 - Applicant **not** required to show a public benefit.
- Chester Rod & Gun Club v. Chester 152 NH 577 (2005)
- Malachy Glen Associates Inc. v. Chichester, Decided March 20, 2007

2. Spirit of the Ordinance

- How would this variance affect the ability to meet the purposes and goals of ordinance.
- Bacon v. Enfield, 150 NH 468 (2004): expanding a building to allow a heating system on one structure will not greatly affect a shoreland area, but adding more space on all similarly situated structures would be significant.

3. Value Not Diminished

- Expert opinion not required.
- Board members can accept or reject what they hear from the experts, and to consider their own knowledge and experience in the area. *Vannah v. Bedford*, 111 NH 105 (1971)
- If expert evidence not contested, can't be ignored, *Malachy Glen Associates Inc. v. Chichester*, decided March 20, 2007

4. Substantial Justice

- Will denial of relief cause a loss to the applicant that outweighs the gain to the public?
- An aspect of the constitutional requirement not to take property without just compensation

5. Unnecessary Hardship

- Former test: some aspect of the land itself means that literal enforcement of the ordinance would deny the owner all reasonable use of the property. *Grey Rocks Land Trust v. Hebron* (1992)
- So difficult to obtain that ordinances came close to an unconstitutional taking of property rights without compensation.

Simplex v. Newington, 2001-2004

- The old rule was abandoned, and became:
 - 1. Zoning restriction as applied interferes with reasonable use of the property
 - 2. No fair and substantial relationship between restriction and purpose of ordinance
 - 3. Variance would not injure the public or private rights of others

Boccia v. Portsmouth, 2004

- Court recognizes a distinction between limits on use of property, and restrictions arising out of area or dimensional standards
- Simplex remains the rule for **use** variances
- A new test is created for **area** variances

The Boccia “Area Variance” Test

- An area variance is needed to enable the use given the special conditions of the property
- The benefit sought by applicant cannot be achieved by some other method reasonably feasible, other than the area variance

And we return to “Special Conditions”

- While we focus on “hardship”, all 5 tests must be met before a variance may be granted, RSA 674:33, I (b).
- Even if the proposed use seems reasonable to applicant, there must be some special condition in the land that sets it apart from other land in the zone to support a variance. See Garrison v. Henniker (August 2, 2006).

Relationship to Other Boards

- An applicant may request the ZBA to hold a joint meetings with any other land use board on a pending matter.
 - RSA 676:2
- Implicit power to notify the Planning Board of ordinance language that is unclear or difficult to apply in practice. RSA 675:3, public hearings on ordinance changes.
- Relationship with the “Administrative Officials”

Relationship to the Public

- Duties to Applicants and Abutters:
 - Procedural due process, notice and the opportunity to be heard
 - Decide the matter on the evidence
- Developing a Record for Court review:
 - Take care to follow procedural requirements
 - Make detailed written findings of fact and rulings on legal questions, RSA 676:3

Conclusion

- Your service on this Board will be challenging, and at times difficult, but ultimately rewarding.
- All members need to remain current with state law, and changes in local ordinances
- Your role is to dispense justice, which means to be fair to all who come before you.